

CHAPTER 2

THE UNITED NATIONS AND LEGAL BASES FOR THE USE OF FORCE

References

1. U.N. Charter
2. Treaty Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), done at Paris, August 27, 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, L.N.T.S. 57
3. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal (Nuremburg Charter), done at London, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279
4. U.N. General Assembly Resolution 337(V), Uniting for Peace, 5 U.H. GAOR Supp. (No. 20) 10 (1950)
5. U.N. General Assembly Resolution 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 25 U.H. GAOR Supp. (No. 28) 121 (1970).
6. U.N. General Assembly Resolution 3314, Definition of Aggression, 29 U.H. GAOR Supp. (No 31) 142 (1974).
7. War Powers Resolution, 50 U.S.C. §§ 1541-1548; Pub. L. No. 93-148 (1972).

I. INTRODUCTION

A. Origin of the United Nations.

1. The name “United Nations” was devised by United States President Franklin D. Roosevelt and was first used in the “Declaration by United Nations” of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers.
2. The United Nations Charter was drawn up by the representatives of 50 countries at the United Nations Conference on International Organization, which met at San Francisco from 25 April to 26 June 1945. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks in August-October 1944. The Charter was signed on 26 June 1945 by the representatives of the 50 countries. Poland, which was not represented at the Conference, signed it later and became one of the original 51 Member States.

3. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories. United Nations Day is celebrated on 24 October each year. Extracted from: Basic Facts About the United Nations, Sales No. E.95.I.31, reprinted at <http://www.un.org/Overview/origin.html>.

II. OVERVIEW OF THE UNITED NATIONS CHARTER

A. General Assembly.

1. Generally treated in Chapter IV of the Charter.
2. May discuss and make recommendations on any matter within the scope of the Charter.
 - a. However, if the Security Council is exercising its powers over the situation, the General Assembly may not make a recommendation unless the Security Council so requests (Article 12(1)).
3. Majority vote unless an “important question,” which requires a two-thirds vote. Important questions include recommendations with respect to the maintenance of international peace and security (Article 18(2)).

B. Security Council.

1. Generally treated in Chapter V of the Charter.
2. Created “to ensure prompt and effective action by the United Nations.” (Article 24(1))
3. Fifteen members.
 - a. Five permanent members: United States, United Kingdom, France, China, and Russia (as successor to USSR).
 - b. Ten non-permanent members elected to two-year terms by the General Assembly.
 - c. Decisions require nine votes, and if a non-procedural matter, requires the concurring votes of the permanent members.

- (1) When North Korea invaded South Korea in 1950, the Soviet Union's delegate to the Security Council was absent (due to a dispute over China's representation in the U.N.). The Security Council authorized collective security measures under the U.N. Charter, and established the United Nations Command in Korea. The Soviet delegate returned and objected, arguing that the resolutions on these non-procedural matters lacked their concurring vote. That argument was rejected, and subsequent practice has confirmed that abstention or absence (i.e., anything short of an affirmative veto) constitutes concurrence.

C. Secretariat.

1. Generally treated in Chapter XV of the Charter.
2. The Secretary-General is the chief administrative officer, appointed by the General Assembly upon the recommendation of the Security Council. (Article 97)

D. International Court of Justice.

1. Treated generally in Chapter XIV of the Charter.
2. The ICJ is the principal judicial organ of the United Nations. (Article 92)
3. Fifteen judges are elected by separate vote of the General Assembly and Security Council. Judges serve for nine years, and may be re-elected.
4. The Statute of the ICJ is an annex to the U.N. Charter.
5. Jurisdiction in a contentious case depends on the consent of the parties:
 - a. Consent may be express or implied in a treaty or other agreement between the parties (Statute Article 36(1)).
 - b. States may also accept compulsory jurisdiction, either unconditionally or on the condition of reciprocity on the part of other parties (Statute Article 36(2)).
 - (1) The United States accepted compulsory jurisdiction, with conditions, in 1946. The acceptance was terminated in 1986.

6. “The decision of the Court has no binding force except between the parties and in respect to that particular case.” (Statute Article 59)

III. USE OF FORCE

A. Historical Antecedents.

1. Kellogg-Briand Pact.

- a. “Art. I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”
- b. Lacked any enforcement mechanism.

2. Nuremburg Charter.

- a. “Article 6. . . . The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; . . . “

B. Charter provisions.

1. Article 2(3).

- a. “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”
- b. This provision has not been relied upon independent of those instances in which Article 2(4) is applicable. In other words, leaving a dispute unsettled, without the use or threat of force, has not been claimed to be a violation of Article 2(3).

2. Article 2(4).

- a. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

- b. Has become the basic provision restricting the use of force among states.
 - c. Note that the prohibition refers to the “threat or use of force,” not “war” or “aggression.”
3. Article 2(7).
- a. “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”
 - b. Recognition of state sovereignty, but still contemplates Chapter VII actions which may affect sovereign prerogatives.

C. General Assembly Resolution 2625.

- 1. Reaffirmed and expanded upon the general Charter principles.
- 2. Declared the principles stated in Article 2 of the Charter to be “basic principals,” or customary, international law.

IV. MAINTAINING INTERNATIONAL PEACE AND SECURITY

A. Security Council.

- 1. Granted “primary responsibility for the maintenance of international peace and security.” (Article 24(1))
 - a. “The responsibility conferred is ‘primary,’ not exclusive. . . . The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security.” *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 163.

2. Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”
3. Security Council’s specific powers are contained in Chapters VI and VII.

B. Chapter VI: Pacific Settlement of Disputes.

1. Chapter focuses on “disputes” (not otherwise defined), especially those which, if unresolved, are likely to threaten international peace and security.
2. Article 33. Obligates Members to seek peaceful settlement to any dispute and authorizes the Security Council to call upon parties to settle.
3. Article 34. Authorizes the Security Council to investigate any dispute or situation to determine whether or not it is likely to endanger international peace and security.
4. Article 36. Authorizes the Security Council to make recommendations on procedures and methods for settlement of any dispute which has been referred to it by parties / Members.
5. Article 37. Authorizes the Security Council to make specific recommendations for resolution of the dispute where parties / Members have failed to do so under the provisions of Article 36.

C. Chapter VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

1. This Chapter gives the Security Council the power to employ non-military or military measures to restore or maintain international peace and security.
2. Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”
 - a. Threshold issue: The existence of a “threat to the peace, breach of the peace, or act of aggression.”

- (1) General Assembly Resolution 3314 recommended to the Security Council a definition of “aggression”:
- (a) Aggression: “ ... the use of armed force by a state against the sovereignty, territorial integrity, or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”
 - (b) Art. 2: first use of armed force by a State in contravention of the Charter is *prima facie* evidence of an act of aggression.
 - (c) Art. 3: other acts constituting aggression include:
 - (i) Bombardment;
 - (ii) Blockade;
 - (iii) Land, sea or air attack;
 - (iv) Using armed forces of one state, which are located within the territory of another (receiving) state under agreement, in contravention of the terms of that agreement; or
 - (v) Allowing use of state territory, which is placed at the disposal of another state, to be used by that state for perpetration of an act of aggression against a third state.
3. Article 41: Authorizes measures short of use of armed force / military intervention and allows the Security Council to call upon all Members to apply such measures. Includes, but is not limited to, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”
4. Article 42: Authorizes “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security,” including “demonstrations, blockades, and other operations by air, sea or land forces, by Members of the United Nations.”
5. Article 43: Provides for special agreements between Members and the U.H. to provide armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security.

D. Chapter VIII - Regional Arrangements.

1. Article 52: Recognized the existence of regional organizations (e.g., Organization of American States, Arab League, Organization of African Unity), and encourages the resolution of local disputes through such arrangements.
2. Article 53: The Security Council may utilize regional arrangements for enforcement actions; regional organizations may not undertake enforcement actions without Security Council authorization.

E. General Assembly Resolution 337(V), "Uniting for Peace."

1. "... if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

V. **SELF DEFENSE AND OTHER USES OF FORCE**

A. Self Defense.

1. Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."
2. Prerequisites / Criteria:
 - a. Necessity: peaceful means of resolution exhausted.

- b. Proportionality: force utilized must be limited in *scope*, *intensity*, and *duration* to that which is reasonably necessary to counter the attack or neutralize the threat.
 - c. Timeliness: proximity to the hostile act.
- 3. With the general acceptance of the prohibition on the use or threat of force (Article 2(4)), self defense has become the focus of contention.
 - a. Those arguing for a broad or expansive right of self defense generally believe that it provides greater deterrence, international stability, and ultimately less uses of force.
 - b. Those arguing for a limited right of self defense are concerned that a broader interpretation erodes the basic prohibition against the unilateral use of force.
 - c. “Inherent right” of self defense: did Article 51 completely codify the pre-existing right, or is there some remainder of the right outside the Charter?
 - d. “Armed attack”: Is the right of self-defense triggered when there is something less than an armed attack?
 - (1) In *Military and Paramilitary Activities In and Around Nicaragua* (Nicaragua v. U.S.), 1986 I.C.J. 14, the ICJ decided that Nicaragua’s provision of arms to the opposition in El Salvador was not an armed attack.
 - e. “Until the Security Council has taken measures”: When the Security Council was stalemated during the Cold War, this was rarely an issue. Now that the Security Council is more active and effective, does their action extinguish a State’s right to continue its self-defense?
- 4. Anticipatory self defense.
 - a. Refers to the concept that self defense is permissible in anticipation of an armed attack.
 - b. Classic statement of the requirements for anticipatory self defense made by Secretary of State Daniel Webster in correspondence relating to the *Caroline* incident: self defense in anticipation of an actual attack should be confined to cases in which “ the necessity of that self

defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

- c. State practice has not respected the restrictive Webster formulation of the right. Two cases in point: the Israeli attack on the Iraqi reactor in 1981 (Israel contended that the reactor would give Iraq a nuclear weapons capability which would be used against Israel); the U.S. bombing of Libya in 1986 (in which part of the justification for the attack was the desire to prevent Libya from exporting terrorism in the future).
- d. CJCSI 3121.01A, *Standing Rules of Engagement for U.S. Forces*, implements anticipatory self defense in the concept of “hostile intent,” by which U.S. forces may respond with force to the threat of force.

B. Humanitarian intervention.

- 1. Although not universally recognized, some States contend that there exists a right to intervene within the territory of another State (without that State’s consent, and without Security Council sanction) in order to prevent certain large-scale atrocities or deprivations. The argument is that such intervention does not violate Article 2(4) because the purpose is not to affect the territorial integrity or political independence of the State. The intervening State bears the heavy burden of proving its “pure motive.”

C. Protection of nationals.

- 1. Protection of nationals has aspects of both self-defense and humanitarian intervention. The State in which the nationals reside has the primary responsibility for providing protection within its territory, and it would only be in cases in which that State was unable or unwilling to provide protection that another State would be justified in intervening. This issue is most likely to be addressed during a Non-Combatant Evacuation Operation (NEO).

VI. DOMESTIC BASES FOR USE OF FORCE

A. U.S. Constitution.

- 1. Legislative Powers (Article I).

- a. Provide for the Common Defense;
 - b. Declare war;
 - c. Issue letters of marque or reprisal;
 - d. Raise and support Armies;
 - e. Provide and maintain a Navy;
 - f. Make rules for the Government and Regulation of the land and naval forces.
2. Executive Powers (Article II).
- a. The executive power shall be vested in the President;
 - b. Commander in Chief.
- B. The War Powers Resolution (1973).
1. History, background and purpose.
- a. “To fulfill the intent of the framers . . .”
 - b. Ensure “collective judgment” of the Executive and Legislative branches.
2. Reporting and consultation requirements.
- a. Section 3: Consultation.
 - (1) “In every possible instance . . .”
 - (2) *Before* introduction of armed forces into actual or imminent hostilities.
 - (3) Regular consultation thereafter.
 - b. Section 4: Reporting.
 - (1) Absent a declaration of war, events triggering WPR report:
 - (a) Introduction of troops into actual or imminent hostilities;

- (b) Introduction of troops into a foreign country, equipped for combat (with some exceptions); or
 - (c) Greatly enlarging the number of troops in a foreign country, equipped for combat.
- (2) Within 48 hours of a triggering event, the President must report the following to both houses of Congress:
 - (a) The circumstances necessitating introduction of armed forces;
 - (b) The Constitutional and legislative authority for introduction of armed forces; and
 - (c) The estimated scope and duration of hostilities or deployment.
- c. Section 5b: The 60 Day Clock.
 - (1) Triggered by Section 4 report or Congressional demand for the same.
 - (2) The President must terminate the use of armed forces within 60 days after the Section 4 report is submitted, unless Congress has:
 - (a) Declared war;
 - (b) Authorized the use of forces;
 - (c) Specifically authorized extension of the deployment / use of forces; or
 - (d) Been unable to meet due to an attack upon the U.S.
 - (3) The President may extend the 60 day period—by 30 days—if he determines and certifies in writing that “unavoidable military necessity respecting the safety of United States armed forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”
- d. Section 5c: The concurrent resolution.
 - (1) Forcing the President to withdraw.

(2) The demand for withdrawal may occur at any time; it is not tied to the “60 day clock.”

3. Executive Branch implementation of the WPR.
 - a. CJCS review of deployment actions.
 - b. Referral to DoD General Counsel, if report required.
 - c. DoD notifies / advises State Department. If report required, DoD General Counsel notifies SECDEF.
 - d. Reports “consistent with” WPR.